Mohamed Jamal bin Inche Im Salleh v Ernest Cheong Yong Yin

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S3–24–723 OF 2003
MOHD HISHAMUDIN J
1 FEBRUARY 2004

Companies and Corporations — Winding up — Disposition of property — Sale and purchase agreement of land entered into before seller wound up — Transfer of land registered after seller wound up — Whether transfer in favour of buyer void — Companies Act 1965 s 223

Land Law — Charge — Validity of — Transferor wound up when land transferred to plaintiff — Plaintiff charged land to bank — Whether charge presented to land office void

Land Law — Restraint on dealings — Caveats — Private caveat — Removal of private caveat — Whether plaintiff valid registered proprietor or beneficial owner of property — Whether plaintiff aggrieved by existence of private caveat — National Land Code s 327

Land Law — Transfer — Registration — Transferor wound up when land transferred to plaintiff — Whether transfer void — Whether plaintiff a valid registered proprietor of land — Whether plaintiff's title indefeasible — National Land Code s 340

This was the plaintiff's application under s 327 of the National Land Code ('NLC') for the removal of a private caveat lodged by the defendant on a property in May 2002. Prior to the lodgement, the defendant had, in December 1995, obtained a monetary judgment against one KM Engineering & Development Sdn Bhd ('KME'). The land title showed that property was transferred to the plaintiff by KME on 14 August 2001. At the time of the purported transfer, KME was already wound up by the High Court pursuant to a winding up petition of a third party. The winding up order was made on 10 June 1998. Although the transfer was effected on 14 August 2001, the transfer form (in Form 14A of the NLC) was executed by the plaintiff and KME in September 1993. The plaintiff stated that he had purchased the land from KME pursuant to a written sale and purchase agreement dated 27 September 1993 ('SPA'). The plaintiff claimed that he had obtained a loan to purchase the property and attributed the long delay in the registration of the transfer to the negligence of the bank's solicitors.

Held, dismissing the plaintiff's application:

(1) Under normal circumstances, the proprietor named in the title would be regarded as the valid registered proprietor unless there was clear evidence to show otherwise. In the instant case, at the time of the registration of the transfer from KME to the plaintiff on 14 August 2001, KME had already been wound up by the High Court. Pursuant to s 223 of the Companies Act 1965, the transfer in favour of the plaintiff, which transfer was made without the order of the court, was void. Accordingly, the plaintiff was not a valid registered proprietor of the property (see paras 11–12).

(2) The Form 14A and the charge presented to the land office by the bank's solicitors in August 2001 were void instruments by reason of the fact that the disposition of the property was void and as such, the plaintiff's title was not indefeasible by virtue of s 340 of the NLC (see paras 13–14); *Bank Islam (M) Bhd v Ainin bte Abdullah & Anor* [1998] 4 MLJ 132 distinguished.

(3) As for the plaintiff's contention that he was a person aggrieved by the existence of the private caveat as he was a beneficial owner of the property by reason of the SPA, the plaintiff neither produced a copy of the SPA nor gave any satisfactory explanation as to why he failed to do so. As such, the plaintiff failed to discharge the burden of proof on a balance of probabilities that he had entered into the SPA (see para 18).

(4) Since the plaintiff was neither a valid registered proprietor of the property nor the beneficial owner of the same, he was not a person aggrieved for the purpose of s 327 of the NLC and consequently, had no right to apply for the removal of the private caveat. As such, it was not necessary for the court to consider whether the defendant had a caveatable interest (see para 25).

[Bahasa Malaysia summary

Ini adalah permohonan plaintif di bawah s 327 Kanun Tanah Negara ('KMT') untuk membatalkan kaveat persendirian yang dimasukkan oleh defendan ke atas sekeping hartanah dalam bulan Mei 2002. Sebelum kemasukan tersebut, defendan telah mendapat satu penghakiman kewangan terhadap KM Engineering & Development Sdn Bhd ('KME') dalam bulan Disember 1995. Hak milik tanah tersebut menunjukkan bahawa hartanah tersebut telah dipindahmilik kepada plaintif oleh KME pada 14 Ogos 2001. Pada masa pindahmilik yang dikatakan tersebut berlaku, KME telahpun digulungkan oleh Mahkamah Tinggi menurut satu petisyen penggulungan pihak ketiga. Perintah penggulungan tersebut telah dibuat pada 10 Jun 1998. Walaupun pindahmilik tersebut hanya berkuatkuasa pada 14 Ogos 2001, borang pindahmilik tersebut (dalam Borang 14A KMT) telah disempurnakan oleh plaintif dan KME dalam bulan September 1993. Plaintif telah menyatakan bahawa beliau telah membeli tanah tersebut daripada KME menurut satu perjanjian jual beli bertarikh 27September 1993 ('PJB'). Plaintif mendakwa bahawa beliau telah memperoleh satu pinjaman untuk membeli hartanah tersebut dan telah menyumbang kepada kelewatan dalam pendaftaran pindah milik tersebut terhadap kecuaian peguamcara bank.

Diputuskan, menolak permohonan plaintif:

(1) Di bawah keadaan biasa, tuanpunya yang dinamakan dalam hakmilik tersebut akan dianggap sebagai tuanpunya berdaftar yang sah kecuali terdapat bukti yang menunjukkan sebaliknya. Dalam kes ini, KME telahpun digulungkan oleh Mahkamah Tinggi tatkala pindahmilik daripada KME kepada plaintif didaftarkan pada 14 Ogos 2001. Menurut s 223 Akta Syarikat 1965, pindahmilik yang berpihak kepada plaintiff, di mana

pindahmilik yang dibuat tanpa perintah mahkamah, adalah tidak sah. Sewajarnya, plaintif bukanlah tuanpunya berdaftar yang sah ke atas hartanah tersebut (lihat perenggan 11–12).

(2) Borang 14A dan gadaian yang dikemukakan kepada pejabat tanah oleh peguamcara bank dalam bulan Ogos 2001 merupakan alat yang tidak sah oleh sebab fakta bahawa pelupusan hartanah tersebut adalah tidak sah dan oleh demikian, hakmilik plaintif boleh disangkal menurut s 340 KMT (lihat perenggan 13–14); *Bank Islam (M) Bhd v Ainin bte Abdullah & Anor* [1998] 4 MLJ 132 dibeza.

(3) Berhubung hujah plaintif bahawa beliau seorang yang terkilan akibat kewujudan kaveat persendirian disebabkan beliau adalah seorang pemilik benefisiari hartanah tersebut menurut PJB tersebut, plaintif tidak mengemukakan sesalinan PJB tersebut maupun memberikan apa-apa penjelasan yang memuaskan tentang kenapa beliau gagal berbuat demikian. Oleh itu, plaintif telah gagal untuk melepaskan beban bukti atas imbangan kebarangkalian bahawa beliau telah memasuki PJB tersebut (lihat perenggan 18).

(4) Memandangkan plaintif bukan tuanpunya berdaftar sah hartanah tersebut maupun pemilik benefisiari yang sama, beliau bukanlah seorang yang terkilan bagi tujuan s 327 KMT dan oleh demikian, tiada hak untuk memohon pembatalan kaveat persendirian tersebut. Oleh itu, ia tidak perlu untuk mahkamah menimbangkan sama ada defendan mempunyai kepentingan untuk memasukkan kaveat (lihat perenggan 25).]

Notes

For cases on disposition of property, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 904–914.
For cases on transfer of registration, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 4037–4041.
For cases on restraint on dealings, caveats, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3015–3312.
For cases on validity of charges, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2093–2098.
For charges, see 8 *Halsbury's Laws of Malaysia* (2003 Reissue) paras [150.343]–[150.380].
For private caveats, see 8 *Halsbury's Laws of Malaysia* (2003 Reissue) paras [150.227]–[150.233].
For registration, see 8 *Halsbury's Laws of Malaysia* (2003 Reissue) paras [150.154]–[150.163].
For winding up, see 8 *Halsbury's Laws of Malaysia* (2003 Reissue) paras [110.007]–[110.499].

Cases referred to

Bank Islam (M) Bhd v Ainin bte Abdullah & Anor [1998] 4 MLJ 132 (distd)

Legislation referred to

Companies Act 1965 s 223
National Land Code ss 327, 329, 340, Form 14A

J Chandra (Arbain & Co) for the plaintiff.
SK Liow (Geetha with him) (Liow & Co) for the defendant.

Mohd Hishamudin J:

[1] This originating summons is an application by the plaintiff for the removal of a private caveat lodged by the defendant on an alienated land. The plaintiff claims that he is the registered owner of the land. In fact the land title shows that the plaintiff is the 'registered proprietor' of the land with effect from 14 August 2001. There is a two-storey bungalow built on the land ('the property' or 'the bungalow'). The application is under s 327 of the National Land Code ('NLC'). There is also a prayer for the assessment of damages under s 329 of the NLC.

[2] The private caveat was lodged by the defendant on 9 May 2002 and registered on 15 May 2002. Prior to this lodgment, the defendant had obtained a monetary judgment of RM239,000 in the High Court, Kuala Lumpur, against a company known as KM Engineering & Development Sdn Bhd ('KM Engineering') in December 1995, and, subsequently, had filed a proof of debt with the official receiver on 16 June 1999. Since KM Engineering failed to satisfy the judgment, the defendant is of the view that the caveat was necessary to protect his 'interest'.

[3] The plaintiff became the 'registered proprietor' of the land when the proprietorship of the land was purportedly transferred to him by KM Engineering on 14 August 2001. An important fact is that at the time of the purported transfer, KM Engineering had already been wound up by the High Court of Kuala Lumpur pursuant to a winding up petition (by a company known as 'Aquamech Corporation Sdn Bhd') under the Companies Act 1965. The winding up order was made on 10 June 1998. Under the winding up order, the official receiver was appointed the liquidator.

[4] The plaintiff claimed that he became aware of the existence of the private caveat only on 22 November 2002, as a result of a land office search made by his present solicitors, Messrs Arbain & Co. The search was made after the plaintiff had entered into a sale and purchase agreement with one Maznah bte Ismail who, according to the plaintiff, had agreed to purchase the property from him for RM1,500,000.

[5] It is to be noted that, although the purported transfer of ownership of the property from KM Engineering to the plaintiff was effected (ie registered) on 14 August 2001, the transfer form (Form 14A, NLC) was duly executed by the KM Engineering and the plaintiff way back in September 1993. Thus, there was a delay of almost eight years in effecting the registration. The plaintiff alleged that this extraordinarily long delay of almost eight years in registering the transfer was due to the negligence of the solicitors (Messrs Mah-Kamariyah) of the bank (Citibank) that financed his purchase of the property. The plaintiff, however, claims that he was not aware of this long delay in the registration of the transfer from KM Engineering to his name, until his solicitors made a search at the land office on 22 November 2002 (that is to say he became aware of the delay only nine years after entering into the sale and purchase agreement in September 1993).

[6] The plaintiff states that he had bought the land from KM Engineering for RM370,000 and that there was a written sale and purchase agreement entered into between KM Engineering and him on 27 September 1993.

[7] Under s 327 of the NLC, only a person aggrieved by the existence of a private caveat may apply to the court to remove the caveat. Section 327 provides:

> 327 Removal of private caveats by the Court
>
> (1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal, and the Court (acting, if the circumstances so require, ex parte) may make such order on the application as it may think just.

[8] The applicant submits that he is a person aggrieved by the caveat and that the defendant has no caveatable interest.

[9] In an application under this provision, the applicant bears the legal burden of satisfying the court that he is a person aggrieved by the existence of the caveat. Only after the applicant has satisfied this initial burden, would it then be incumbent upon the caveator to satisfy the court that he has a caveatable interest and that there is a valid reason for the caveat to remain.

[10] Thus, the inquiry must first begin with the question: is the plaintiff a person aggrieved?

[11] The plaintiff claims that he is a person aggrieved by the existence of the private caveat by reason of the fact that he is the 'registered proprietor' of the property. There is no dispute that, on record, the plaintiff is the 'registered proprietor' of the property. However, in my opinion, it is not enough for the plaintiff to show that on record he is the 'registered proprietor' of the land. He must go a step further. He must also satisfy the court that he is a valid registered proprietor. Under normal circumstances, upon production before the court of a prima facie valid land title, the court will regard the person, named in the title as the proprietor, as the valid registered proprietor; unless there is clear evidence or there are facts that show otherwise. In the present case, however, there are undisputed facts that show that the title adduced as evidence to the court is not a valid title and that the plaintiff is not a valid registered proprietor of the bungalow. The title is not valid because, as has been stated above, at the time of the purported registration of the transfer of the property from KM Engineering to the plaintiff on 14 August 2001, KM Engineering was already wound up by the High Court (it is to be recalled that KM Engineering was wound up on 10 June 1998). Now, by reason of s 223 of the Companies Act 1965, such a transfer was void. Section 223 provides:

> 223 Avoidance of dispositions of property, etc.
>
> Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

[12] It is undisputed that the purported transfer was made without the order of the court. In my judgment, if the transfer was void, then no matter what the record says, no matter what is stated in the land title, the title is not valid and the plaintiff is not a valid registered proprietor of the property.

[13] In my judgment, the principle of the indefeasibility of title as prescribed by s 340 of the NLC does not protect the 'proprietary interest' of the plaintiff. Paragraph (b) of subsection (2) of s 340 stipulates that:

> (2) The title or interest of any such person or body shall *not* be indefeasible —
>
> …
>
> (b) where registration was obtained by forgery, or *by means of* an insufficient or *void instrument*; …

(Emphasis added.)

[14] In my view, the Form 14A and the charge presented to the Land Office of Kuala Lumpur by the bank's solicitors in August 2001 were void instruments by reason of the fact that the disposition of the land was void. The presentation of the transfer form to the land office of Kuala Lumpur for the registration of the transfer was, in my view, a 'disposition' of the property of the company for the purpose of section 223 of the Companies Act 1965. The disposition of the property was void by virtue of s 223 of the Companies Act 1965 because, at the time of the disposition, the transferor, KM Engineering, had already been wound up and there was no approval of the court obtained in respect of the transfer. I accept that at the time the Form 14A was executed by KM Engineering and the plaintiff way back in September 1993 the company was not yet wound up and thus the dealing was then valid. However, the Form 14A, the instrument, became a void instrument when it was presented to the Kuala Lumpur land office in August 2001 (after KM Engineering had been wound up) for registration without the approval of the court.

[15] The plaintiff, invoking s 340 of the NLC, claims that he is a bona fide purchaser for valuable consideration and thus has obtained a valid title. The plaintiff cites *Bank Islam (M) Bhd v Ainin bte Abdullah & Anor* [1998] 4MLJ 132. The case cited can be distinguished. The case cited involved a purchaser in good faith and for valuable consideration. The plaintiff in the present case, however, as this judgment will soon show, is not a purchaser in good faith for valuable consideration.

[16] In his alternative submission the plaintiff argues that, even if he is not a valid registered proprietor, nevertheless, he is still a person aggrieved by the existence of the private caveat by reason of being the 'beneficial owner' of the property. He contends that he is the beneficial owner of the bungalow by reason of the fact that he had entered into a written sale and purchase agreement in respect of the property with KM Engineering on 27 September 1993, and that he had paid the full purchase price of RM370,000 in 1994 by means of partly his own money and partly (and substantially) by obtaining a bank loan of RM296,000 from Citibank.

[17] He states that for the purpose of the alleged sale and purchase agreement, his solicitors were Messrs SA Helmy & Partners, the solicitors for the vendor were Messrs Chin & Co, and the solicitors for the bank, Citibank (which provided him the loan for the purchase), were Messrs Mah-Kamariyah & Partners.

[18] I am unable to accept the contention of the plaintiff that he is the beneficial owner of the property by reason of a sale and purchase agreement between the plaintiff and KM Engineering. The onus of proving that he had entered into a written sale and purchase agreement with KM Engineering lies on the plaintiff. He has to discharge the burden of proof on a balance of probabilities. In my judgment, he has failed to discharge that burden. I say so because the plaintiff, having claimed that he had entered into a written sale and purchase agreement with KM Engineering, yet, rather strangely, not only does he fail to produce in his affidavits a copy of the alleged sale and purchase agreement, he also does not offer any satisfactory explanation as to why he fails to do so. Remarkably, in his affidavits, he does not at all explain as to what happened to his copy of the agreement, which he should have as a purchaser: whether his copy was lost, or misplaced, or destroyed. Or, whether his solicitors had failed to supply him with a copy of the sale and purchase agreement? He merely says that he does not have a copy of the agreement. But he does not explain why he, as a purchaser, does not have one. Since the plaintiff fails to produce the sale and purchase agreement, and fails to explain as to why he fails to do so, I consider that he has failed to prove on a balance of probabilities that there was a sale and purchase agreement between him and KM Engineering. Hence, I make a finding of fact that the alleged sale and purchase agreement between the plaintiff and KM Engineering, in reality, does not exist.

[19] The plaintiff claims that he had obtained a loan from Citibank for the purpose of purchasing the property. However, here again the plaintiff has failed to prove such a purpose. The best evidence to prove such a purpose would he the letter of offer/approval from Citibank in response to his application for the loan and the loan agreement itself. Significantly, the usual letter of offer/approval from the bank was not exhibited. Such a letter, if exhibited, will disclose the purpose of the loan. No explanation is given as to why the offer/approval letter is not exhibited. Indeed the averments in the plaintiffs affidavits do not at all make any mention of the letter of offer/approval. What are exhibited are a loan agreement, the charge and correspondences between solicitors. But, remarkably, nowhere is stated in the loan agreement that the loan was for the purpose of financing the purchase of the said property. Instead, in the Second Schedule of the loan agreement, the 'purpose' of the loan is stated to be merely 'For productive use only'. Thus all that the plaintiff was able to prove was only that a loan of RM296,000 was granted to him by Citibank and that he had 'purportedly' charged the property to Citibank as security for the loan.

[20] I must add that although there is evidence that there was a delay for almost eight years in effecting the registration of the transfer and the charge, nevertheless, I cannot accept the claim by the plaintiff that the delay in presenting

the Form 14A and the charge was due solely to the negligence of the bank's solicitors, and that (very surprisingly) throughout the eight years he was not at all aware of the non-registration (or the inordinate delay) of the transfer of the property from KM Engineering to him — until 22 November 2002 (ie nine years after the alleged signing of the sale and purchase agreement with KM Engineering in September 1993). In my view, on the hypothesis that he had purchased the property from KM Engineering under a sale and purchase agreement and that it was financed by Citibank, it is highly improbable for the unreasonable delay to register to have happened by reason of negligence on the part of the bank's (Citibank's) solicitors; and that the plaintiff as well as the bank was not aware of the omission to register for almost eight years (or nine years in the case of the plaintiff). This is because, on the supposition that there was indeed a sale and purchase of the property and that the purchase was financed by Citibank, and that each party was represented by their respective solicitors, as named by the plaintiff, there were, therefore — and it is pertinent to note — several other parties, apart from the bank's solicitors (Messrs Mah-Kamariyah & Partners), who were interested or duty bound in ensuring that the registration of the transfer and charge was duly effected. These other parties are:

(a) the plaintiff (as purchaser) and his solicitors (Messrs SA Helmy & Partners);

(b) KM Engineering (as the vendor) and its solicitors (Messrs Chin & Co); and

(c) the lending bank (Citibank).

[21] Any omission to register the transfer and charge (for whatever reason) by the bank's solicitors, as, indeed, had happened in the present case, could not have escaped the notice of these parties — certainly not all of them and certainly not for as long as almost eight years (or nine years in the case of the plaintiff).

[22] As for the plaintiff, having expended (as he claims) RM370,000, a relatively large sum of money for an individual, for the purchase of the bungalow, it is natural that he would see to it that the property be registered under his name as soon as possible. After all, the plaintiff is neither a simpleton nor an illiterate, but the general manager of a hotel, and he must have known what his basic rights are and the importance of having his name registered on the title. Moreover, surely as the new owner of the bungalow he looked forward to paying the annual quit rent to the land office and the annual local authority rate to the local authority, and if he did not receive any notice to pay the quit rent or the rate, as the case may be, from either the land office or the local authority, which will happen if his name is not registered on the title, he would not have kept quiet — certainly not for eight years — but would have made inquiries and would have discovered in due course the cause of the non-receipt of the notices. Therefore, I find it very difficult to believe that the delay to register his name on the title could have escaped his notice for nine eight years (the alleged sale and purchase agreement was signed in September 1993 but plaintiff claims that he became aware of the eight year delay only in November 2002 after a search made on 22 November 2002!).

[23] As for Citibank, in particular its credit department, having lent RM296,000 to the plaintiff, it had not only an interest but also a *duty* to ensure that its solicitors duly carried out their duty of effecting promptly the registration of the transfer and the charge — the security for the loan. As the charger, it also had a duty to ensure that the title and charge, being the security documents, once the registration process was completed, were in the safe custody of the bank. This being the case, the credit department would have had notice and would not have kept quiet, certainly not for almost eight years, if the bank's solicitors failed to secure the registration of the transfer and the charge. And it would then be the duty of Citibank to pull up its solicitors if the latter was guilty of any delay in respect of the transfer and the charge. But there was no evidence adduced by the plaintiff to show that Citibank had taken reasonable precaution to ensure that the transfer and the charge were promptly registered by its solicitors and that the bank could not be faulted for the blunder that had happened. And this brings me to the following pertinent observation: in the light of the duty and responsibility of Citibank as regards to the registration of the transfer and the charge, I am perplexed to note that the plaintiff is putting the blame in respect of the delay in registering *solely* on the shoulders of Messrs Mah-Kamariyah (indeed, it is stated in the plaintiffs affidavit that he intends to take legal action against this legal firm in respect of the delay) who, as solicitors, was merely an agent of the bank, but no blame at all is placed on Citibank — the principal itself!

[24] As for the KM Engineering, on the hypothesis that it was the vendor, although it had received the full payment of RM370,000 from the plaintiff, nonetheless, it also had an interest to ensure that there was a change in ownership on the title. This is because so long as it remained the registered owner of the bungalow, it was liable to pay the annual quit rent and the annual local authority rate and would continue to receive the notices to pay from these two authorities. And by reason of the omission to register the transfer, the company was still the registered owner of the bungalow. Thus, the omission to effect registration of the transfer would certainly have come to the notice of KM Engineering, and surely it would have taken step to ensure the omission be rectified without any delay.

[25] In conclusion, I hold that:

(a) the plaintiff is not a valid registered proprietor of the property; nor is he a beneficial owner of the same. As such, he is not a person aggrieved for the purpose of s 327 of the NLC. Since he is not a person aggrieved, he has no right to apply for the removal of the caveat; and

(b) in view of (a) above, it is unnecessary for this court to consider whether the defendant (the caveator) has a caveatable interest.

Plaintiff's application dismissed.

Reported by Lim Lee Na